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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

DAVID McGREGOR d/b/a McGREGOR WORLD TRAVEL SERVICE,

Petitioner,

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1971

DAVID MCGREGOR d/b/a MCGREGOR WORLD TRAVEL SERVICE,

Petitioner.

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David McGregor d/b/a McGregor World Travel Service petitions for a writ of certiorari to review the order in this case of the United States Court of Appeals for the Second Circuit dismissing an appeal from an order denying a stay of an arbitration proceeding for lack of jurisdiction. The respondents herein, in addition to Air Transport Association of America ("ATA"), are all members of ATA and are Alaska Airlines, American Airlines, Braniff International, Delta Air Lines, Eastern Air Lines, Mohawk Airlines, National Airlines, Northeast Airlines, Northwest Airlines, Southern Airways, Trans World Airlines, United Air Lines, and Western Air Lines.

Opinion Below

The Court of Appeals did not render an opinion in this case. The opinion of the District Court for the Southern District of New York (Appendix A, *infra*) was not reported.

Jurisdiction

The order of the Court of Appeals (Appendix B, *infra*) was entered on May 24, 1971 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Whether an order of the District Court is appealable where such order denied petitioner's motion to stay an arbitration proceeding when the question to be arbitrated is whether respondents have violated the antitrust laws of the United States (15 U. S. C. 1, 2, 15) (28 U. S. C. 1292 (a) (1)).

Statutes Involved

15 U. S. C. 1, 2 and 15 provide, in pertinent part:

> §1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *
>
> §2. *Monopolizing trade a misdemeanor; penalty*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§15. *Suits by persons injured; amount of recovery*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

49 U. S. C. 1374 (b) provides:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

28 U. S. C. 1292 (a) (1) provides:

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court

of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

Statement

Petitioner is a travel agent with offices in White Plains, New York, who derives his income from commissions received on the sale of airline tickets and related services. Respondent ATA is an association of all major domestic air carriers and the remaining respondents are air carrier members thereof. By agreement among the air carriers they will pay commission on the sale of airline tickets to travel agents, like petitioner, only if the travel agents have the prior and continuing approval of ATA and, after obtaining such approval, are appointed as agents by the individual air carrier members of ATA. By this agreement the air carriers mutually agree not to do business with travel agents who do not have ATA approval or who do not retain such approval. Thus the agreement is in reality a group boycott of all travel agents who do not have ATA approval—a *per se* violation of the antitrust laws. By virtue of the Federal Aviation Act, 49 U. S. C. 1384, however, ATA and the air carriers are relieved from the operation of the antitrust laws if the agreement pursuant to which they act is submitted to and approved by the Civil Aeronautics Board and is performed in accordance with law.

Petitioner obtained ATA approval in 1953 and subsequently was appointed agent by the respondent air carriers. From that time until the current dispute, petitioner's relationship with respondents was impeccable. In June of 1970 ATA, for unknown reasons and without

prior warning, instituted an investigation into petitioner's business. In the course thereof ATA accused petitioner of improperly withholding commissions. At that same time, ATA claimed that these improperly withheld commissions amounted to $1,867.75 and demanded payment therefor. Petitioner immediately paid the amount demanded.

Despite this payment, ATA in July 1970 issued a complaint against petitioner charging that he had improperly withheld commissions. Petitioner responded to this charge claiming, among other things, that by accepting payment ATA had waived its right to complain concerning this allegation. The complaint and petitioner's response thereto was submitted to a review board composed solely of employees of members of ATA. That review board issued a suspension of petitioner's ATA approval for 60 days for allegedly improperly withholding commissions. By virtue of the agreement among the air carriers the respondent air carriers are prohibited from paying petitioner any commission, thereby depriving him of his major source of income for this period. In other words, respondent air carriers threatened to engage in a group boycott against petitioner. Faced with this prospect, petitioner requested that the decision of ATA's review board to suspend his approval for 60 days be reviewed by arbitrators.

Pending the commencement of the arbitration, petitioner discovered that First National City Bank Travel Service, a wholly owned subsidiary of First National City Bank, Inc. (a much larger travel agent than petitioner), had also recently been charged by ATA with improperly withholding commissions and because of the gravity of the particular offense had its approval cancelled by ATA. Petitioner also discovered that as a result of negotiations, ATA had agreed to rescind the cancellation of First

National City Bank Travel Service if it agreed to halt the alleged improper practice. At no time was there any demand that First National City Bank Travel Service repay the alleged improperly withheld commissions and, in fact, those amounts were never repaid. In addition, petitioner became aware of other travel agents who were charged with the identical offense petitioner allegedly committed but did not receive any suspension whatsoever.

Petitioner instructed counsel to contact ATA and request that petitioner's 60 day suspension be rescinded upon the promise to halt the alleged improper practice. This offer was rejected by ATA. ATA has never explained the basis for its discriminatory treatment of petitioner.

By virtue of its continued attempt and threat to suspend petitioner for 60 days for a less serious offense than that committed by First National City Bank Travel Service and for the same offense committed by other travel agents, ATA and the respondent air carriers have discriminated against petitioner in violation of 49 U. S. C. 1374 (b) and lost their immunity from prosecution under the antitrust laws. Consequently, petitioner instituted this proceeding and alleged that ATA and the respondent air carriers were violating 15 U. S. C. 1, 2 and 15. At the same time counsel contacted counsel for ATA, who agreed to a voluntary stay of the pending arbitration proceeding pending the disposition of this case. ATA subsequently withdrew its consent to a voluntary stay of the arbitration proceeding and petitioner moved in the District Court for the Southern District of New York for a stay of the pending arbitration proceeding on the grounds that the issue to be decided by the arbitrators was an antitrust issue. That motion was denied by the District Court (Opinion, Appendix A, *infra*). Thereafter

petitioner timely filed a notice of appeal from that order. Respondent then moved to dismiss the appeal on the grounds that the order appealed from was not appealable. Respondent's motion to dismiss the appeal was granted by the Court of Appeals on the ground that it lacked jurisdiction even though the issue to be decided in the arbitration directly involved an antitrust question and as such was not subject to arbitration.

Reasons for Granting the Writ

The Decision Below Conflicts With Decisions of Other Courts of Appeals

The issue raised by this writ is whether or not an order denying a stay of an arbitration in an antitrust suit is appealable. By its order in this case the Second Circuit held that such orders are not appealable. In this respect, the Court followed its prior decision in *Greater Continental Corporation* v. *Schecter,* 422 F. 2d 1100 (2d Cir. 1970), which expressly held that an order denying a stay of arbitration was not the denial of an injunction pursuant to 28 U. S. C. 1292 (a) (1) and thus was not appealable. It should be noted that *Greater Continental, supra,* did not involve an antitrust case.

In *A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.,* 396 F. 2d 710 (9th Cir. 1968), the Ninth Circuit expressly held that an order denying a stay of arbitration was the denial of an injunction pursuant to 28 U. S. C. 1292 (a) (1) and thus was appealable. This case, which did involve antitrust issues, was cited by the Second Circuit in *Greater Continental, supra,* but was disregarded by it.

After the decision of the Second Circuit in *Greater Continental, supra,* the Ninth Circuit again considered the issue. In *Power Replacements, Inc.* v. *Air Preheater Co.,*

Inc., 426 F. 2d 980 (9th Cir. 1970), the Ninth Circuit confirmed its decision in *A. & E. Plastik Pak Co., Inc., supra.* The rationale for the decisions of the Ninth Circuit is that to deny a stay of arbitration in effect acts as a stay of the Court proceeding and as such is appealable. This is exactly the situation in which petitioner finds himself since his Court case cannot proceed until the arbitration is concluded. The conflict between the Circuits could not be clearer.

The order of the Second Circuit in this case raises serious questions as to the forum for the resolution of antitrust issues. As this matter now stands, petitioner is required to arbitrate antitrust issues. This result is contrary to settled law and contrary to the rule of the Second Circuit itself as expressly settled in *American Safety Equip. Corp.* v. *J. P. Maguire Co., Inc.*, 391 F. 2d 821 (2d Cir. 1968). More importantly, the order in this case opens the door to the arbitration of all antitrust issues and for this reason alone the order should not be permitted to stand.

Moreover, if the order is permitted to stand, it will introduce an unwarranted anomaly into the law since orders which stay or enjoin a court proceeding and compel arbitration are appealable in the Second Circuit, *American Safety Equip. Corp., supra.* Thus the person who institutes a lawsuit subsequently enjoined in conjunction with a motion to compel arbitration may appeal such order. However, a person who enters into arbitration and subsequently discovers that there are antitrust issues which cannot be arbitrated and institutes a lawsuit, will not be permitted to appeal an order denying a stay of arbitration. The law should not permit such anomalies.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 20, 1971

Respectfully submitted,

ANTHONY F. LOFRISCO,
Counsel for Petitioner.

LOFRISCO GALLAGHER & KENNY,
on The Petition.

APPENDIX A

Opinion and Ruling of District Court

David McGregor, d/b/a McGregor World Travel Service v. Air Transport Association of America, 71 Civ. 1309

Plaintiff moves for an order staying arbitration.

Plaintiff conducts a travel agency. Defendant Air Transport Association of America is an organization to which the defendant airlines belong. The airlines have agreed to deal only with those travel agents approved by the Association. The contract between the plaintiff and the defendants regulates the sale of tickets and rates of commission on these airlines.

A dispute arose between the parties regarding the claim for commissions made by the plaintiff. The defendants allege that fraudulent representations were made by plaintiff as to the number of group and individual seats sold. Pursuant to the agreement between the parties, the defendants imposed a 60-day suspension of plaintiff's certification. The plaintiff then initiated arbitration and the arbitrators have been selected by the parties as provided in the contract.

Plaintiff now claims that the defendants, by imposing the 60-day suspension, discriminated against him because a lighter sanction was imposed on another travel service for allegedly having committed the same violation. Consequently plaintiff claims that by virtue of such discrimination the defendant airlines have lost their exemption from the antitrust laws and are amenable to the present suit. 49 U. S. C. §§1374(b) and 1384.

The questions for arbitration are whether the plaintiff did in fact breach its agreement with the defendants regarding

the commissions, whether the disposition of the dispute with the other travel service was similar to this one, and the propriety of the sanction itself. I fail to see how the plaintiff has any cause of action here until the procedures provided in the contract between the parties have been exhausted.

Accordingly, the motion to stay the arbitration is denied. So ordered.

Dated: New York, N. Y.
April 16, 1971

CHARLES M. METZNER
U. S. D. J.

APPENDIX B

Order of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and seventy-one.

DAVID MCGREGOR, d/b/a MCGREGOR WORLD TRAVEL SERVICE,

Plaintiff-Appellant,

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, AIR WEST, ALASKA AIRLINES, ET AL.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellee Air Transport Association of America by notice of motion dated May 13, 1971 to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is granted.

A. DANIEL FUSARO
Clerk

Before:

HON. IRVING R. KAUFMAN
HON. ROBERT P. ANDERSON
Circuit Judges
HON. WALTER R. MANSFIELD
District Judge

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-260

DAVID McGREGOR d/b/a McGREGOR WORLD TRAVEL SERVICE,

Petitioner,

—v.—

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents.

MEMORANDUM FOR RESPONDENTS

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IN THE

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OCTOBER TERM, 1971

No. 71-260

DAVID McGREGOR d/b/a McGREGOR WORLD TRAVEL SERVICE,

Petitioner,

—v.—

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents.

MEMORANDUM FOR RESPONDENTS

ARGUMENT

Respondents concur that there is a conflict between the Courts of Appeals of the Second and Ninth Circuits on this important and recurring federal procedural question of whether or not a court order denying a stay of arbitration is appealable.[1] The holdings of the Second Circuit denying appealability, however, are manifestly correct. Having extensive experience with matters involving arbitration the Second Circuit has distinguished between stays of arbitration and stays of other court proceedings:

> "The reason for the different approach to stays of arbitration as compared to stays of other court proceedings

[1] Compare, *Greater Continental Corporation* v. *Schechter*, 422 F.2d 1100 (2d Cir. 1970) and *A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

is twofold: (1) appealability of a denial to stay arbitration would further delay the arbitration proceedings and thereby eliminate one of the primary purposes of arbitration, i.e., the speed of the proceedings; (2) arbitration differs from another court proceeding in the essential respect that arbitration would not produce an enforceable result without further judicial action" *Greater Continental Corporation* v. *Schechter*, 422 F.2d 1100, 1102-1103 (2d Cir. 1970).

In addition, contrary to petitioner's allegations, antitrust questions have no bearing on the rationale behind the decision of the Second Circuit in *Greater Continental, supra;* and antitrust issues are not before the arbitrators in this case.

The orders below do not require petitioner to "arbitrate antitrust issues."[2] As the District Court held in its order of April 16, 1971:

> "The questions for arbitration are whether the plaintiff did in fact breach its agreement with the defendants regarding the commissions, whether the disposition of the dispute with the other travel service was similar to this one and the propriety of the sanction itself."

Respondents thus disagree that the question to be arbitrated is whether respondents have violated the antitrust laws of the United States. Notwithstanding, since the issue of the appealability of an order denying a stay of arbitration is of importance in the uniform administration of federal appellate procedure and the orderly conduct of arbitration proceedings, a definitive ruling by this Court is appropriate.

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[2] Petition, p. 8.

For these reasons, respondents do not oppose the present petition.

Respectfully submitted,

HAROLD L. WARNER, JR.
Counsel for Respondents

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JOHN N. ROMANS

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NEW YORK, NEW YORK
Of Counsel

Dated: September 17, 1971

Certificate of Service

I, HAROLD L. WARNER, JR., hereby certify that:

1. I am a member of the Bar of this Court.

2. I have this day served the attached Memorandum for Respondents by depositing true copies thereof in a Letter Box maintained and exclusively controlled by the United States at 25 Broadway, New York, New York 10004, with first class postage prepaid, addressed to counsel for petitioner, Anthony F. LoFrisco, 10 East 40th Street, New York, New York 10016.

HAROLD L. WARNER, JR.

September 17, 1971